In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1382

WILLIAM C. DEAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner Dean was a coppersmith-pipefitter employed by Todd Shipyards, Inc. While Todd was performing extensive overhaul and reconstruction work upon the U.S.S. TALUGA, a Navy vessel tied up at Todd's repair docks, petitioner suffered injuries from slipping twice while working in an area of the ship under Todd's exclusive control (Pet. App. 7, 15).

Petitioner sued the United States, alleging, *inter alia*, that his injuries had resulted from the failure

of the United States to maintain the TALUGA in a seaworthy condition. Applying *West* v. *United States*, 361 U.S. 118, the district court explicitly found, and the court of appeals agreed, that no warranty of seaworthiness was owed to petitioner because the TALUGA was a dead ship rather than a vessel in navigation. See *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85.

2. Whether a vessel was in navigation is, of course, a question of fact. *Roper* v. *United States*, 368 U.S. 20, 22-23. It follows, in light of the concurrent factual findings of the courts below, that the present case is not one appropriate for further review by this Court.

In any event, the rulings of the courts below were correct. In *West*, this Court held that a vessel was not in navigation where repairs being done on her amounted not to

> "ship's work" but a complete overhaul of such nature, magnitude, and importance as to require the vessel to be turned over to a repair contractor and docked at its pier for the sole purpose of making her seaworthy. It would be an unfair contradiction to say that the owner held the vessel out as seaworthy in such a case. * * * [361 U.S. at 122.]

Precisely the same situation existed aboard the TALUGA. At the time of the accident, the vessel was tied up at Todd's dock and Todd's employees had removed the turbines, the main engines, the boilers, substantially all of the generators, the entire steering system, the electronic and communications gear, the main condensate pumps, and the bilge pumps (Pet.

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App. 6). The ship had to draw electricity, steam, and water from the shore. All areas in which the renovation was proceeding were under Todd's complete control, and Navy and civilian government personnel were prohibited from interfering with Todd's work, although inspection was permitted. (Pet. App. 7, 8.)

The petitioner was injured in pump room #2, where the existing pumps and their foundations were being ripped out. His injuries were attributable to conditions existing as a result of the repair work. (Pet. App. 2-4.) As in *West*, it is obvious that the United States did not hold the vessel out to the petitioner as seaworthy.

The petitioner seeks to distinguish the present case from *West* because the TALUGA remained a commissioned vessel, her Navy crew was using her for living quarters, and Navy personnel inspected Todd's work (Pet. 7). But these facts did not restore the TALUGA into the active maritime service or transform her into a vessel in navigation. Cf. *Roper* v. *United States*, 368 U.S. 20. And in *West* this Court found it irrelevant that certain of the owner's employees were on board the ship "since they gave no orders, and did not participate in the work or supervise its progress, but were simply inspectors or observers." 361 U.S. at 123. Similarly, the fact that a number of the crew were living on the TALUGA is irrelevant since their presence had no connection with the repair work or with navigation of the vessel.

The petitioner also claims that the decision below conflicts with *Lawlor* v. *Socony-Vacuum Oil Co.*, 275 F. 2d 599 (C.A. 2), and *Union Barge Line Corp.* v. *Allen*, 361 F. 2d 217 (C.A. 5). But those decisions were based on materially different factual findings as to the owner's control of the vessel or whether it was in navigation.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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